Committee on House Administration in the contests of Woodward v O'Brien, which summary report also provided for disposition of the election contests of Roberts v Douglas (14th Congressional District of California), and Michael v Smith (Eighth Congressional District of Virginia). [H. Rept. No. 1106.] The report recited that no testimony in behalf of contestants had been taken during the time prescribed by law in any of the contests, and recommended that notices of intention to contest the elections of contestees be dismissed.

Mr. Gamble called up House Resolution 345[4] on July 26, 1947, which was agreed to by the House without debate and by voice vote, and which—

Resolved, That the election contest of Harold C. Woodward, contestant, against Thomas J. O'Brien, contestee, Sixth Congressional District of Illinois, be dismissed, and that the said Thomas J. O'Brien is entitled to his seat as a Representative of said district and State; and be it further

Resolved, That the election contest of Frederick M. Roberts, contestant, against Helen Gahagan Douglas, contestee, Fourteenth Congressional District of California, be dismissed and that the said Helen Gahagan Douglas is entitled to her seat as a Representative of said district and State; and be it further

Resolved, That the election contest of Lawrence Michael, contestant, against Howard W. Smith, contestee, Eighth Congressional District of the State of Virginia, be dismissed, and that the said Howard W. Smith is entitled to his seat as a Representative of said district and State.

Note: Syllabi for Woodward v O'Brien may be found herein at § 5.6 (committee power to dismiss election contests); § 23.2 (motion for default judgment); § 27.5 (dismissal of contests for failure to take testimony within statutory period); § 43.1 (form of committee report).

§ 55. Eighty-first Congress, 1949–50

§ 55.1 Browner v Cunningham

Mr. Thomas B. Stanley, of Virginia, submitted the unanimous report[5] of the Committee on House Administration on Aug. 11, 1949, in the contested election case of Browner v Cunningham from the Fifth Congressional District of Iowa. (The report also contained committee recommendations in the contested election cases of Fuller v Davies, 35th Congressional District of New York, and of Thierry v Feighan,

4. 93 CONG. REC. 10445, 80th Cong. 1st Sess.; H. Jour. 716.

5. H. Rept. No. 1252, 95 CONG. REC. 11316, 81st Cong. 1st Sess.; H. Jour. 831.

20th Congressional District of Ohio.) The case had come to the House (along with the other two cases above mentioned) on July 26, 1949, when the Speaker had laid before the House a letter from the Clerk (6) transmitting a copy of contestee's answer (filed for information only) and relating that no testimony had been received, the time for such having long since expired. The letter, containing as well the Clerk's opinion that the contest had abated, was referred by the Speaker on July 26 to the committee, and ordered printed with accompanying papers as a House document.

Contestee's answer filed with the Clerk alleged among other things that contestant had not filed notice of intention to contest the election within 30 days after determination of the result thereof as required by statute, and that the 30-day state law requirement for impounding election machines had expired, thus rendering the machines themselves incompetent as evidence.

The summary and unanimous report from the Committee on House Administration stated that:

> Under the laws and committee rules governing contested-election cases in the House of Representatives, more than 90 days elapsed since the filing of notice to contest the elections of the respective contestees in the above-entitled contested-election cases, and no testimony of any character, kind, or nature of the parties in the said contests having been received by the Clerk of the House of Representatives in behalf of the contestants in support of the allegations set forth in their notice of intention to contest said election.
>
> It is hereby respectfully submitted that notice of intention to contest the election in the afore-mentioned cases be dismissed by reason of failure to comply with the laws and committee rules governing contested-election cases in the House of Representatives.

Accordingly, House Resolution 324 (7) was called up as privileged by Mr. Stanley and agreed to without debate and by voice vote on Aug. 11, 1949. House Resolution 324 provided:

> *Resolved,* That the election contest of Vincent L. Browner, contestant, against Paul Cunningham, contestee, Fifth Congressional District of the State of Iowa, be dismissed, and that the said Paul Cunningham is entitled to his seat as a Representative of said district and State; be it further
>
> *Resolved,* That the election contest of Hadwen C. Fuller, contestant, against John C. Davies, contestee, Thirty-fifth Congressional District of the State of New York, be dismissed and that the said John C. Davies is entitled to his seat as a Representative of said district and State; and be it further

6. H. Doc. No. 277, 95 CONG. REC. 10248, 10249, 81st Cong. 1st Sess.; H. Jour. 751.

7. 95 CONG. REC. 11294, 81st Cong. 1st Sess.; H. Jour. 830.

Resolved, That the election contest of James F. Thierry, contestant, against Michael A. Feighan, contestee, Twentieth Congressional District of the State of Ohio, be dismissed and that the said Michael A. Feighan is entitled to his seat as a Representative of said district and State.

Note: Syllabi for Browner v Cunningham may be found herein at § 6.8 (items transmitted by Clerk); § 24.2 (answer filed for information only); § 27.1 (dismissal for failure to take testimony within statutory period).

§ 55.2 Fuller v Davies

On Aug. 11, 1949, Mr. Thomas B. Stanley, of Virginia, submitted the unanimous report[8] of the Committee on House Administration in the contested election case of Fuller v Davies from the 35th Congressional District of New York. The report also contained committee recommendations in the contested election cases of Thierry v Feighan, 20th Congressional District of Ohio, and Browner v Cunningham, Fifth Congressional District of Iowa. The case had been presented to the House (with the two other cases above mentioned) on July 26, 1949, at which time the Speaker had laid before the House a letter from the Clerk[9] transmitting copies of contestant's notice and of contestee's answer thereto, and containing the Clerk's statement that the contest had abated, as no testimony had been received within the time required by law. The Clerk's letter was referred to the Committee on House Administration and ordered printed with accompanying papers.

Contestant's notice contained 11 forms of fraud, irregularity, and discrepancy alleged to have occurred in certain wards within the district, sufficient to annul the 138-vote majority received by contestee. Contestee's answer denied these allegations severally.

The summary and unanimous report from the Committee on House Administration stated that:

> Under the laws and committee rules governing contested-election cases in the House of Representatives, more than 90 days elapsed since the filing of notice to contest the elections of the respective contestees in the above-entitled contested-election cases, and no testimony of any character, kind, or nature of the parties in the said contests having been received by the Clerk of the House of Representatives in behalf of the contestants in support of the allegations set forth in their notice of intention to contest said election.

8. H. Rept. No. 1252, 95 CONG. REC. 11316, 81st Cong. 1st Sess.; H. Jour. 831.

9. H. Doc. No. 278, 95 CONG. REC. 10249, 81st Cong. 1st Sess.; H. Jour. 751.

It is hereby respectfully submitted that notice of intention to contest the election in the afore-mentioned cases be dismissed by reason of failure to comply with the laws and committee rules governing contested-election cases in the House of Representatives.

Accordingly, House Resolution 324 [10] was called up as privileged by Mr. Stanley and agreed to without debate and by voice vote on Aug. 11, 1949. House Resolution 324 declared:

Resolved, That the election contest of Vincent L. Browner, contestant, against Paul Cunningham, contestee, Fifth Congressional District of the State of Iowa, be dismissed, and that the said Paul Cunningham is entitled to his seat as a Representative of said district and State; be it further

Resolved, That the election contest of Hadwen C. Fuller, contestant, against John C. Davies, contestee, Thirty-fifth Congressional District of the State of New York, be dismissed and that the said John C. Davies is entitled to his seat as a Representative of said district and State; and be it further

Resolved, That the election contest of James F. Thierry, contestant, against Michael A. Feighan, contestee, Twentieth Congressional District of the State of Ohio, be dismissed and that the said Michael A. Feighan is entitled to his seat as a Representative of said district and State.

§ 55.3 Stevens v Blackney

The contested election case of Stevens v Blackney, from the Sixth Congressional District of Michigan, was presented to the House on Sept. 22, 1949, at which time the Speaker laid before the House and referred to the Committee on House Administration a letter from the Clerk.[11] The Clerk's letter, which was ordered printed by the Speaker as a House document, recited that, agreed upon or proper testimony had been ordered printed by the Clerk, and, together with notice of contest and answer, and briefs, had been sealed and was ready for referral to the Committee on House Administration.

On Mar. 6, 1950, Mr. Burr P. Harrison, of Virginia, submitted the committee report [12] to accompany the recommended committee resolution declaring contestee entitled to his seat. Part II of the report contained the views of Mr. Wayne L. Hays, of Ohio, and of Mr. Anthony Cavalcante, of Pennsylvania.

The majority report set forth three issues in the contest as follows:

(1) Whether contestant without evidence is entitled to a recount

10. 95 CONG. REC. 11294, 81st Cong. 1st Sess.; H. Jour. 830.

11. H. Doc. No. 336, 95 CONG. REC. 13177, 81st Cong. 1st Sess.; H. Jour. 917.

12. H. Rept. No. 1735, 96 CONG. REC. 2898, 81st Cong. 2d Sess.; H. Jour. 186.

under the supervision of the House committee?

The report indicated that the contestant had, on Feb. 10, 1949, applied to the Committee on House Administration to send its agents to conduct a recount, prior to contestant's taking of any testimony during the time prescribed by statute. On Feb. 15, 1949, the Subcommittee on Elections informed contestant that the House could, "on recommendation from the committee, order a recount after all testimony had been taken, in precincts where the official returns were impugned by such evidence" (citing House precedents). The committee rationale in support of this unanimous subcommittee recommendation was that the probability of error should first be shown, that a Member whose election has been certified should not be subjected to "fishing expeditions," that the committee would be overburdened with "frivolous contests," that an unwise precedent would be set, and that there is no proof that a House-conducted recount would be more accurate. The minority report did not contest this conclusion, but did point out in connection with another communication that on the date of the communication (Mar. 2, 1949) "there was nothing before the subcommittee or the House except contestant's notice and contestee's answer thereto." These papers and all testimony were in the custody of the Clerk until Sept. 22, 1949, on which date the contest was presented to the House.

(2) Whether contestant, of his own accord and without evidence, is entitled to conduct a recount without any supervision?

The facts as presented in the "chronological chart of events" contained in the minority report, indicate that contestant did on two separate occasions cause a subpena duces tecum to be issued directing the election officials to deliver up the original ballots and voting machines to a notary public of contestant's own selection. On Feb. 3, 1949, the contestant had caused such subpena duces tecum to be issued, and on Feb. 10, contestee had obtained a restraining order against such subpena from a local chancery court. On Feb. 14, a local election official appeared before the notary public but refused to bring with him the ballots, etc., on the basis of the restraining order, which the chancery court had issued based on contestee's argument that such a recount had not been ordered by the House or by its committee. On Feb. 25, on removal to the United States district court, the contest-

ant succeeded in obtaining an order dissolving the chancery court restraining order.

On Mar. 2, 1949, contestant again caused to be served a subpena duces tecum on the local election official, who, on Mar. 8, again refused to produce the requested ballots, tally sheets, and statements. The election official based this second refusal on a communication, dated Mar. 2, which he had received from the Subcommittee on Elections of the Committee on House Administration. Signed by Burr P. Harrison, of Virginia, its Chairman, the communication read as follows:

> The Subcommittee on Elections has ruled that a recount of the ballots at this time is premature and irrelevant. There is no process under Federal law whereby a notary public can be directed to take possession of ballots in an election contest.
>
> I do not know whether under the law of your State a notary public has the power to issue a subpoena duces tecum and as to this, and as to whether the subpoena has been issued in accordance with the law of the State, you are referred to your own attorney.
>
> Precedents of the House of Representatives clearly establish that in a contested election case ballots should be inspected and preserved in strict conformity with State law so that their inviolability is unquestioned. No action should be taken by either contestant or contestee with reference to ballots that does not follow the law of the State.
>
> The official count of the ballots is presumed correct, and I am certain that this presumption will not be brought into question by any unauthorized recount which is made contrary to State law or under circumstances which do not give full protection to both contestant and contestee.

On Mar. 15, 1949, the Subcommittee on Elections "sustained the action of the election official who had refused to comply with such subpena duces tecum." To this decision and to the communication above, the minority report took strong exception. The minority contended that the notary public was an "officer" of the House by virtue of 2 USC § 206 and the Supreme Court case of *In re Loney* (1890), 134 U.S. 372, which stated that "any one of the officers designated by Congress to take the depositions of such witnesses (whether he is appointed by the United States . . . Or by a State, such as a . . . notary public) performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress. . . ."

The minority again pointed out that at the time of the communication from the chairman of the subcommittee, the election contest had not been presented to the House. The minority cited several

House election cases wherein it had been held that a notary public was a proper official of the House before whom testimony could be taken, and before whom ballots may be examined and a report submitted to the House. Taking further exception to Mr. Harrison's communication, the minority contended that a notary public acting in such capacity derived his authority from the federal election laws and the rules of the House, and that a notary public so appointed need not inspect the ballots in strict conformity with state law, as the power to examine ballots vested in the House is infinite.

The majority report, however, resolved issue (2) by deciding that the power of an officer (notary public) to require the production of "papers" (under 2 USC § 219) pertaining to the election did not require the production of "ballots." This decision of the majority of the committee was contrary to previous precedents of the House, i.e., Greevy v Scull (2 Hinds' Precedents § 1044) and Kunz v Granata (6 Cannon's Precedents § 186) which held that ballots are among the "papers" of which the officer taking testimony in an election case may demand the production. The minority also cited Rinaker v Downing (2 Hinds' Precedents § 1070), in which the majority report coincided with the above precedents, but where "the majority report referred to was rejected by the House and the resolution of the minority substituted." The majority report in Stevens v Blackney stated that the accepted procedure was that the House itself should order a recount, and provide the subpena power and payment of the expenses thereof.

The majority rationale for their construction of the word "papers" was based upon certain practical considerations, such as the difficulty of submitting certified copies of such "official papers" to the Clerk, payment to officials for making such copies, inclusion of voting machines as official papers. Further, the majority cited the problem of deciding which count would be accepted by the House, that of contestant's notary public or that of the bipartisan officials who first conducted the count, should contestant be permitted to conduct a recount on his own motion. The alternative that the House could then conduct a third count, related the majority, would not overcome the dilemma, as the inviolability of the ballots would then have been destroyed. The option of authorizing the contestee to name a second notary to attend

the hearings would not resolve the question of which notary would have custody of the ballots overnight.

Citing early cases, the majority report quoted the "accepted uniform rule" in holding that a magistrate taking testimony "was not a person or a tribunal authorized to try the merits of the election and had no authority under the law of Pennsylvania or of Congress to order those boxes to be broken open. . . . The committee were of the opinion that such an application should be founded upon some proof sufficient at least to raise a presumption of mistake, irregularity, or fraud in the original count, and ought not to be granted upon the mere suggestion of possible error. The contestant failed to furnish such proof."

(3) Did the evidence in this case justify a recount of the ballots?

Of the 207 precincts in the congressional district, the evidence showed, according to the majority report, that election officials in four of those precincts had erroneously counted ballots, which had been marked as straight party ballots and also marked for the congressional candidate of another party, as votes for both candidates. Those errors were corrected by the official canvassers and were not reflected in the official returns. The report related that from the statement of one of the election officials that the same erroneous method of counting could have been followed in other precincts, contestant was urging that a total recount be conducted. Contestant accompanied this contention with evidence attacking the returns of three precincts. Contestant submitted no evidence, however, that the law of Michigan had been violated either in the appointment of bipartisan election officials or in allowing challengers of contestant's party to be present in any of the remaining 200 precincts. Thus, the majority of the committee applied a principle of evidence to presume that the failure of contestant to produce party election officials and challengers from any of the 200 precincts as witnesses must have been "because their testimony would show an honest and fair count."

On this issue, the minority report contended that, as the recount in seven precincts had reduced contestee's plurality from 1,217 votes to 784 votes, that it was reasonable to assume that a complete recount would overcome contestee's plurality. Citing Galvin v O'Connell (6 Cannon's Precedents § 126) the minority contended that "if it is reasonable to suppose there was error in

judgment in counting ballots cast in a portion of the precincts in the district, it is equally reasonable to assume there was error in judgment in counting the ballots in the remaining precincts."

On May 23, 1950, Mr. Harrison called up as privileged House Resolution 503,[13] and immediately yielded to Mr. Cavalcante, who offered a substitute[14] resolution which:

> *Resolved,* That the contested-election case of George D. Stevens v. William W. Blackney from the Sixth Michigan Congressional District (Eighty-first Congress, election of November 2, 1948) be recommitted to the Committee on House Administration with instructions (1) to allow, under the rules of the subcommittee on elections and the precedents established by the House of Representatives, the contestant and his attorney to inspect the poll lists, registration books, ballot boxes, ballots, tally sheets, and statements of returns pertaining to this contested election, and (2) that after said inspection, to direct the parties to this contest, under such rules as the committee may determine, to take testimony and return the same, as required by the rules of the subcommittee on elections and laws (2 U.S. Code 201–226) governing contested-election cases and the precedents established by the House of Representatives (*Stolbrand v. Aiken* (Hinds' I, 719); *Goodwyn v. Cobb* (Hinds' I, 720); *Greevy v. Scull* (Hinds' II, 1044); *Steele v. Scott* (Cannon's VI, 126); *Galvin v. O'Connell* (Cannon's VI, 146); *Kunz v. Granata* (Cannon's VI, 186)).

Mr. Cavalcante thereupon yielded to Mr. Harrison, who immediately moved the previous question on the substitute resolution, which was rejected by voice vote.

House Resolution 503 was then agreed to without debate and by voice vote. House Resolution 503 declared:

> *Resolved,* That William W. Blackney was elected a Representative in the Eighty-first Congress from the Sixth Congressional District of the State of Michigan and is entitled to a seat as such Representative.

Note: Syllabi for Stevens v Blackney may be found herein at § 7.7 (magistrates' authority to open ballot boxes); § 29.3 (ballots as "papers" required to be produced); § 34.2 (necessity of producing evidence); § 36.8 (effect of absence of witnesses for contestant); § 39.3 (unsupervised recount); § 40.2 (justification for recount); § 40.4 (burden of showing fraud, irregularity or mistake); § 41.3 (production of evidence justifying a recount as prerequisite) § 42.18 (substitute resolutions); § 43.9 (minority reports).

§ 55.4 Thierry v Feighan

On Aug. 11, 1949, Mr. Thomas B. Stanley, of Virginia, submitted

13. 96 CONG. REC. 7544, 81st Cong. 2d Sess.; H. Jour. 434, 435.

14. *Id.*

the unanimous report[15] of the Committee on House Administration in the contested election case of Thierry v Feighan from the 20th Congressional District of Ohio. The report also contained committee recommendations in the contested election cases of Browner v Cunningham, Fifth Congressional District of Iowa, and of Fuller v Davies, 35th Congressional District of New York. Contestee's answer, filed with the Clerk for information only, had been contained in the Clerk's letter[16] transmitted to the Speaker on July 26, 1949, and laid before the House on that date. The letter recited that no testimony had been received during the period required by statute, and that the contest appeared abated. The Clerk's letter, upon being referred, was ordered printed with accompanying papers.

The summary and unanimous report from the Committee on House Administration stated that:

> Under the laws and committee rules governing contested-election cases in the House of Representatives, more than 90 days elapsed since the filing of notice to contest the elections of the respective contestees in the above-entitled contested-election cases, and no testimony of any character, kind, or nature of the parties in the said contests having been received by the Clerk of the House of Representatives in behalf of the contestants in support of the allegations set forth in their notice of intention to contest said election.
>
> It is hereby respectfully submitted that notice of intention to contest the election in the afore-mentioned cases be dismissed by reason of failure to comply with the laws and committee rules governing contested-election cases in the House of Representatives.

Accordingly, House Resolution 324[17] was called up as privileged by Mr. Stanley and agreed to without debate and by voice vote on Aug. 11, 1949. House Resolution 324 declared:

> *Resolved,* That the election contest of Vincent L. Browner, contestant, against Paul Cunningham, contestee, Fifth Congressional District of the State of Iowa, be dismissed, and that the said Paul Cunningham is entitled to his seat as a Representative of said district and State; be it further
>
> *Resolved,* That the election contest of Hadwen C. Fuller, contestant, against John C. Davies, contestee, Thirty-fifth Congressional District of the State of New York, be dismissed and that the said John C. Davies is entitled to his seat as a Representative of said district and State; and be it further
>
> *Resolved,* That the election contest of James F. Thierry, contestant, against

15. H. Rept. No. 1252, 95 CONG. REC. 11316, 81st Cong. 1st Sess.; H. Jour. 831.

16. H. Doc. No. 279, 95 CONG. REC. 10248, 81st Cong. 1st Sess.; H. Jour. 751.

17. 95 CONG. REC. 11294, 81st Cong. 1st Sess.; H. Jour. 830.

Michael A. Feighan, contestee, Twentieth Congressional District of the State of Ohio, be dismissed and that the said Michael A. Feighan is entitled to his seat as a Representative of said district and State.

§ 56. Eighty-second Congress, 1951–52

§ 56.1 Huber v Ayres

Mr. Omar T. Burleson, of Texas, submitted the majority report[18] on Aug. 21, 1951, in the contested election case of Huber v Ayres, from the 14th Congressional District of Ohio. The case had been presented to the House on July 11, 1951, on which date the Speaker had referred to the Committee on House Administration and ordered printed a letter from the Clerk[19] transmitting the required papers and testimony pursuant to 2 USC §§ 201 et seq. The record showed that there had been three candidates in the election held Nov. 7, 1950, and that contestee (Mr. Ayres) had received a plurality of 1,921 votes over the contestant (102,868 to 100,947, the independent candidate having received 7,246 votes).

The contestant "alleged a failure on the part of the county boards of elections to rotate properly the names of the three candidates on the general election ballot as required by section 2 (a) of article V of the Ohio Constitution." As a result of this failure contestant requested that the election be declared void or that he be seated as the elected member. The committee ruled that "the matter of rotating the names on the ballot is a procedural requirement of the State election process and a matter which Congress has consistently left for the States to determine." Under section 4 of article I of the United States Constitution, state legislatures are left free to determine times, places, and manner of elections for Congress, subject to alteration by congressional regulation. As Congress had only seen fit to regulate the date on which congressional elections were to be held, and to regulate the form of the ballots to be used (2 USC §§ 7, 9), the majority proceeded to apply state law, namely the constitutional provision which:

> . . . [R]equires that the names of all candidates shall be so alternated that each name shall appear (insofar as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs (Ohio Constitution, art. V, § 2a, adopted Nov. 8, 1949).

18. H. Rept. No. 906, 97 CONG. REC. 10494, 82d Cong. 1st Sess.; H. Jour. 645.

19. H. Doc. No. 189, 97 CONG. REC. 8015, 82d Cong. 1st Sess.; H. Jour. 479.